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THE PRESIDENT IS RIGHT ON IMMIGRATION

By Stephen Legomsky
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President Obama announced Thursday a temporary reprieve from deportation, and offered temporary permission to work, for several million undocumented longtime residents with close family members in the U.S. The executive order, he said, was not an amnesty and federal authorities would focus on deporting “felons, not families. Criminals, not children. Gang members, not a mom who’s working hard to provide for her kids.”

Predictably, his critics have accused him of acting illegally. The accusations are baseless.

The president’s legal authority is clear. First, the prosecutorial discretion that the president has exercised is a well-established, vital law-enforcement tool. When resources don’t permit 100% enforcement, agencies are forced to set priorities. Year after year, Congress has knowingly given the administration only enough resources to take legal action against some 400,000 of the estimated 11 million undocumented immigrants in the U.S. – less than 4% of that population. Sensibly, the administration believes that removing those who threaten public safety and those who entered recently is a higher priority than breaking up families and upending the lives of productive long-term residents – especially those brought here as children.

OK, some say, I get prosecutorial discretion. But where is the legal authority to grant deferred action – the program that provides temporary reprieves – and work permits? The answer is simple. The immigration statute expressly recognizes deferred action by name, expressly authorizes the administration to grant work permits, and places no limitations on either. The formal agency regulations, in place since 1987, specifically authorize the grant of work permits to recipients of deferred action. And a long line of court decisions expressly recognize deferred action, again without limitation.

Second, there is no constitutional impediment. Critics sometimes charge that executive action on the scale he outlined Thursday would violate the president’s constitutional duty to “take care that the laws be faithfully executed.” The president will continue to uphold that constitutional obligation. His actions will still leave millions of undocumented immigrants to pursue, with resources that still will make barely a dent in that remaining population. Nothing the president is doing will prevent him from continuing to deport as many undocumented immigrants as his limited resources permit. He is therefore “taking care that the laws be faithfully executed” to the full extent that the resources Congress has appropriated will allow. Two months ago, 138 law professors who specialize in immigration wrote to the president, confirming his legal authority to use deferred action for large groups of undocumented immigrants.

Third, almost all of our recent presidents – men as politically diverse as Dwight Eisenhower, Ronald Reagan, Bill Clinton, George H.W. Bush and George W. Bush – have taken similar large-scale actions, for humanitarian and foreign-policy reasons. For example, after Congress provided legalization to certain undocumented immigrants but consciously declined to do so for their family members, President Reagan unilaterally extended legalization to the children. The first President Bush then further extended it to the spouses and granted them work permits. These executive actions were projected to reach 1.5 million family members – almost half of the then-undocumented population. None of these

presidents' actions elicited howls of protest, cries of "illegal," and threats of impeachment – until President Obama announced he would do something similar.

Fourth, the president is not creating a new path to permanent residence. He recognizes that only Congress can do that. His decision will be only a temporary measure, one that settled law and layers of executive precedents clearly permit.

Finally, consider the practicalities. Deferred action gets people out of the shadows and into the open. Right now, we don't know their names. We don't know where they live. We don't know their histories. To receive deferred action, they will have to provide all this information and more. The government will perform background checks for any criminal histories or other concerns.

This population is not about to leave. They have stuck it out even through the worst economic crisis since the Great Depression. But because they have not been authorized to work, unscrupulous employers know they can hire them at shockingly low wages. This not only gives employers an incentive to hire them over U.S. job seekers, it also depresses the market wages for all workers. By permitting these individuals to work legally, the president's actions take away both of those perverse incentives. That's good news for them and all U.S. workers.

Republican congressional leaders say these actions destroy any prospects for legislative reform. But the House has made abundantly clear that it had no intention of passing comprehensive immigration reform. Despite years of debate, and 17 months after the Senate passed its bipartisan bill, the House has not passed – or, for that matter, brought to a vote – even the piecemeal legislation that it claims to prefer. Going from "we won't pass a bill" to "now we really won't pass a bill" is not a credible threat.

It is also not a rational threat. If the president's congressional critics are truly unhappy with his temporary solutions, there is an easy remedy: Pass a bill that permanently fixes what all seem to agree is a broken immigration system.

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